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No. 84-1139

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CHARLES D. BRENNAN, GERALD T. GRIMALDI, COURTLAND J. JONES, GEORGE C. MOORE AND GEROULD W. PANGBURN,
Petitioners,

v.

TINA HOBSON, *et al.*,
Respondents.

Petition For a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Respondents initially concede that all of the arguments in the Petition were raised and considered in the trial court and the court of appeals (Brief in Opp. at 11).[1] Although the appellate court rendered a

[1] "All of the arguments raised by petitioners have already been carefully considered and rejected below both by the trial court, by

(footnote continued on next page)

130-page opinion, respondents describe the case as involving only "routine doctrines" of law (*ibid.*). But after staking out this position, respondents immediately abandon it. They spend the rest of their time arguing—rather inconsistently—that the questions presented in the Petition are not fairly before the Court because they were not raised below (*see, e.g., id.* at 14, 18, 19, 26).

Much of what respondents say in this regard is either inaccurate or misleading. The questions presented in the Petition are ripe for review. As we discuss below, respondents have provided nothing that would justify denying the writ. The case comes to the Court bristling with issues of profound public importance, issues that most certainly warrant review by this Court.

1. The Petition raises a question of great significance regarding the law of conspiracy as applied to the federal civil service. In related contexts, this Court and the lower federal courts have held that a conspiracy cannot be found when in fact what exists is a program devised by a single policymaking body and carried out by the officers and employees of that institution (Pet. 7-8). That is the situation with respect to COINTELPRO, a nationwide law enforcement program formulated by the FBI and implemented by agents throughout the country who have, as result of the decisions below, been designated as co-conspirators.

(footnote cont.)

the panel of the Court of Appeals and again in the unreported *per curiam* decision denying FBI defendants' motion for rehearing *en banc*."

Respondents are silent in regard to the authorities we cited to support our contention. Rather than addressing these decisions, respondents seek to convince the Court that the conspiracy question is not properly presented (Brief in Opp. at 12-15). They have two points. Neither has any substance.

First, they claim that our arguments are irrelevant because the COINTELPRO was not viewed as a conspiracy in the courts below (*id.* at 13-14). Respondents are clearly wrong on this score. Their statement not only flies in the face of the court of appeals' opinion (*see, e.g.*, Pet. App. 35a, 36a, 54a, 66a, 105a), but also contradicts the position they consistently maintained throughout the course of this litigation.[2]

Respondents' other point is that it was not until after trial that the FBI defendants argued the conspiracy issue now raised in the Petition (Brief in Opp. at 13-15). This too is not accurate. The FBI defendants in their pretrial brief [3] and in their motion for a directed verdict objected on the ground that, as the district court put it, "employees working under a common direction of one institution and bound to-

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[2] Plaintiffs' counsel stated the matter succinctly: "COINTELPRO was a nationwide conspiracy." Pretrial Tr. 227, 227-30; *see* Pretrial Tr. 103-110. *See, e.g.*, Plaintiffs' Pretrial Brief, at p. 16 (plaintiffs intend to prove that the FBI conspiracy was "formally institutionalized . . . under the name Counterintelligence Program (COINTELPRO)"); Brief of Appellees and Cross-Appellants Hobson, *et al.*, at p. 12 ("The record demonstrates a multi-faceted conspiracy to obstruct plaintiffs' exercise of their rights. One part was the FBI's highly-structured secret program known as COINTELPRO. . . .").

[3] Pretrial Brief of Federal Defendants, at 19-20.

gether by their employer/employee relationship are not, by cooperating, engaging in conspiracy." [4] Indeed, the FBI defendants' pretrial brief relied upon then-Judge Stevens' opinion in *Dombrowski* v. *Dowling,* 459 F.2d 190 (7th Cir. 1972),[5] which the Petition also quotes (at p. 8).[6]

2. The Petition raises the question whether politically motivated conspiracies are actionable under 42 U.S.C. § 1985(3) (Pet. 9-11), a question this Court reserved in *United Brotherhood of Carpenters and Joiners* v. *Scott,* 103 S.Ct. 3352, 3359-3360 (1983), after noting the far-reaching consequences such a doubtful interpretation would entail. Respondents counter that petitioners waived any objection because their argument "was never made at trial" (Brief in Opp. at 19).

We presume respondents' mistake is inadvertent. The record shows that petitioners raised the Section 1985(3) issue prior to trial, only to have their position rejected by the district court in its ruling *in limine.*[7]

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[4] Tr. 255 (Dec. 9, 1981) ; *see also id.* at 252-254.

[5] Rather than attempting to explain why the analysis in *Dombrowski* v. *Dowling, supra,* should not control here, respondents seek to divert attention from this important question of law by resorting to a pejorative (Brief in Opp., at 15).

[6] Respondents do not address our further argument that it was not—and is not—clearly established that when a federal employee implements a federal program that may involve excessive actions, that employee thereby becomes a member of a conspiracy in which he is vicariously liable for the actions of every other employee who participates in the program. We therefore rely on the discussion of this issue in the Petition (at pp. 14-15).

[7] The district court held that under Section 1985(3), plaintiffs were entitled to recover if the animus was because "of their politi-

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Moreover, respondents themselves maintained that they would try the case on the basis that "the animus was according to political belief."[8] It was, of course, unnecessary for petitioners to object to an instruction the trial court had already ruled was legally correct.[9] That is why both the district court (Pet. App. 143a-144a) and the court of appeals (Pet. App. 32a-40a) had no doubt that the Section 1985(3) issue was properly before them.

Respondents assert that in any event the record contains sufficient evidence to demonstrate the presence of racial animus (Brief in Opp. 19-22). But the case was not tried on that basis and the jury was never asked to make a finding that these FBI defendants were motivated by racial animus (*see* notes 6 & 7, *supra*). Moreover, in attempting to fit this case into a racial mold, respondents engage in serious distortion. Claiming that "defendants then prepared" a racially inflammatory paper, they quote the paper at length (Brief in Opp. at 21). But as respondents well know, and as both the court of appeals (Pet. App. 38a-39a) and the district court (Pet. App. 171a) recognized, this document was not prepared by any of the

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(footnote cont.)

cal activities or associations." Final Pretrial Order, at p. 4 (Nov. 23, 1981). The court so charged the jury in an instruction quoted at page 10 of the Petition.

[8] Tr. 116 (Nov. 16, 1981). Respondents further contended, in response to the district court's inquiry, that "Yes, Your Honor, there is authority that a class designated by political belief does constitute a class for purposes of 1985(3)" *Id.* at 117.

[9] *See, e.g., Brown* v. *Avemco Investment Corp.*, 603 F.2d 1367, 1370-71 (9th Cir. 1979); *Stewart* v. *Ford Motor Co.*, 553 F.2d 130, 139-41 (D.C. Cir. 1977).

FBI defendants. Respondents may have intended to claim that these defendants were responsible for a paper written in New York by an unidentified "co-conspirator" agent because they were part of COINTELPRO. If this is their meaning, they have vividly demonstrated the danger of the conspiracy theory that has permeated this case.[10]

3. The court below determined that no FBI defendant was entitled to immunity. As we discussed in the Petition, the court reached this result because each FBI defendant had become a member of the COINTELPRO conspiracy and because COINTELPRO constituted a nationwide program in violation of clearly established constitutional rights (Pet. 13-15). This case thus presents the question whether, under *Harlow* v. *Fitzgerald,* 457 U.S. 800 (1982), immunity determinations in civil rights conspiracy actions are to be made in light of the particular conduct of each individual defendant, as we have argued, or are to be made on the basis of a conspiracy doctrine rendering each defendant responsible for actions undertaken by any co-conspirator, as the court of appeals held.

Respondents have chosen not to confront the issue. They insist that it was "simply for convenience" that

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[10] The matter discussed in the text is not the only illustration. Respondents, for example, claim that COINTELPRO injured them by disrupting radio communications during a demonstration (Brief in Opp. 7). They fail to mention that none of the FBI defendants took part in such disruption and that there was no evidence that any of the FBI defendants had prior knowledge of these activities. Respondents also cite certain "press releases" regarding a non-party but fail to point out that there was no evidence that any such "press releases" were ever made public (Brief in Opp. at 20).

the court of appeals rejected defendants' immunity claims by determining that COINTELPRO violated clearly established rights (Brief in Opp. at 17). It is hardly certain what respondents intend to convey by their description of the court's holding. Without doubt, it is "convenient," particularly in a multiple defendant case, to assess each defendant's immunity claim in terms of what the "conspiracy" did; that dispenses with any need to engage in a separate evaluation of each defendant's conduct. But is is precisely such a separate evaluation that the principles of *Harlow* demand, as we argued in the Petition (at 13-14). Otherwise, individual accountability is lost and the floodgates are opened to the kind of extensive and disruptive litigating tactics that *Harlow* set iself against (Pet. 14).

To the extent that respondents are claiming that the court's immunity ruling represented an individualized inquiry of the sort *Harlow* requires, respondents are in error. The opinion never even hints that this was intended and the court's holding is as we have described it. Indeed, the court itself acknowledged "that the record reflects extraordinary variety in the level of participation of each [FBI] defendant" (Pet. App. 106a). The court could treat the defendants as a group for the purpose of determining immunity only because it viewed the conspiracy, not their particular conduct, as determinative. Moreover, the court's ruling on appeal followed a path clearly marked out at trial despite petitioners' strenuous objections that immunity must be decided separately with respect to each agent and *his* conduct, rather than on the basis that the acts

of all other co-conspirators are deemed to be those of the defendants.[11]

4. Respondents' treatment of the fraudulent concealment issue entirely misses the point. We contended that the fraudulent concealment doctrine cannot be invoked on the ground that the conspiracy itself was secret (Pet. 17-21). Otherwise, we argued, the statute of limitations would be emasculated in civil conspiracy cases since, as the Court held in *Grunewald* v. *United States,* 353 U.S. 391 (1957), conspiracies are by their nature secret (Pet. 18).

One obviously cannot answer our argument by asserting that the limitations period should be tolled because here the FBI conducted secret activities as part of the conspiracy. Yet that is essentially all respondents have to offer in their opposition (Brief in Opp. 25-28). They dismiss *Grunewald* on the basis that it was a criminal case and that when the Court

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[11] The jury was instructed, first, that each conspirator was liable for the injuries caused by other members of the conspiracy and next, that a defendant would be entitled to immunity only if "he reasonably and in good faith believed that the conduct for which he would otherwise be held liable was" lawful. Tr. 250, 260 (Dec. 17, 1981).

Petitioners had argued, in support of their motion for a directed verdict, that the immunity question should not be submitted to the jury on such a basis and sought a ruling that notions of vicarious liability must play no part in determining an agent's immunity from suit. To illustrate their point, petitioners' counsel asked the district court: "How does defendant Brennan prove good faith with regard to an event in which he was not involved? How does he prove that he was acting in good faith?" Tr. 326 (December 6, 1981).

declined to allow the secret nature of conspiracies to extend the limitations period, the Court did so for "policy reasons" (*id.* at 28 n. 2). Respondents fail to recognize that those policy reasons are as applicable to this case as they were in *Grunewald* and that we rely upon them (Pet. 15-18). Indeed, the reasoning of *Grunewald* has even greater force here since, as we have argued (Pet. 15-16), federal officers in the position of these FBI defendants rarely will be able to control whether or when their "conspiracy" should be revealed so as to start the limitations period running. Accordingly, only affirmative actions by such defendants to conceal a prior conspiracy should toll the statute. In this case the record reveals no such affirmative actions by these FBI defendants.[12]

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[12] Respondents do not address our contention (Pet. 21-22) that the court below also erred in failing to determine whether the fraudulent concealment doctrine was satisfied with respect to the individual actions against each defendant, as distinguished from the claims based on conspiracy.

Respondents also fail to discuss the conflict between the decision below and *Garcia* v. *Wilson*, 731 F.2d 640 (10th Cir. 1984), *certiorari granted*, (Oct. 1, 1984) (No. 83-2146).

CONCLUSION

For the foregoing reasons and the reasons stated in the Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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